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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICHAEL A. ABELS,)

11 Petitioner,)

12 v.)

13 RON VAN BOENING,)

14 Respondent.)
_____)

CASE NO. C08-1118- RAJ-JPD

REPORT & RECOMMENDATION

15 Petitioner is a state prisoner who was convicted in 1982 of first-degree murder. The trial
16 court imposed a maximum sentence of life imprisonment and petitioner's sentence has been under
17 the jurisdiction of the Indeterminate Sentence Review Board ("ISRB"). He has filed a *pro se*
18 petition for a writ habeas corpus pursuant to 28 U.S.C. § 2254, challenging action taken by the ISRB
19 in 1990. (Dkt. No. 6). Respondent has filed a motion to dismiss, raising the statute of limitations as
20 a bar to the court's consideration of the petition. (Dkt. No. 11). Petitioner has filed a response,
21 which, it appears, he did not serve on respondent. (Dkt. No. 13). As discussed below, the Court
22 concludes that it need not address the question of the timeliness of petitioner's habeas petition
23 because the record reflects that petitioner currently has a personal restraint petition ("PRP") pending
24 in the state court and therefore, the instant federal petition is premature.

25 A state prisoner seeking to file a petition for writ of habeas corpus in federal court must first
26 complete his state appeal and any other proceedings available in state court, such as a writ of habeas

1 corpus. 28 U.S.C. § 2254(b) and (c). This is because “[s]tate courts should have the first
2 opportunity to examine the lawfulness of a state prisoner's confinement. If the prisoner's claim is
3 meritorious, and if the state remedy is prompt and complete, there is no need to bring post-
4 conviction proceedings in federal courts.” *Sherwood v. Tomkins*, 716 F.2d 632, 633 (9th Cir. 1983)
5 (citing *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982)). Therefore, if a petitioner has a post-
6 conviction proceeding still pending in state court, he cannot file in federal court. *See Sherwood*, 716
7 F.2d at 634; *see also Schnepf v. Oregon*, 333 F.2d 288 (9th Cir. 1964) (per curiam) (state remedies
8 not exhausted if a state post-conviction proceeding is pending). Indeed, when a state court
9 proceeding is pending, “a would-be habeas corpus petitioner must await the outcome of [the
10 proceeding] before his state remedies are exhausted, even where the issue to be challenged in the
11 writ of habeas corpus has been finally settled in the state courts.” *Sherwood*, 716 F.2d at 634. This
12 is because the state proceeding may result in the release of the petitioner, thereby mootng the
13 federal question. *Id.*

14 The exhibits provided by respondent indicate that petitioner currently has a PRP pending in
15 the Washington state court system.¹ (Dkt. No. 11, Ex. 45). In his PRP, petitioner requests that he be
16 released from confinement. (*Id.* at 5). If this relief is granted, the instant federal habeas petition
17 would become moot. Since petitioner has a pending state action which may moot or otherwise affect
18 his claims before this Court, the instant Petition must be dismissed.² *See* 28 U.S.C. § 2254(c);
19 *Sherwood*, 716 F.2d at 634; *see also Schnepf*, 333 F.2d at 288; *Bell v. Pacholke*, Case No. C07-
20 1936-RAJ (W.D. Wash., Order entered Feb. 5, 2008). A proposed Order reflecting this

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22 ¹ Although the Washington Court of Appeals dismissed this PRP, the Court’s own research
23 reveals that petitioner has filed a motion for discretionary review that is now pending before the
24 Washington Supreme Court. *See In re Abels*, Case No. 824045 (Wash. S. Ct.). Thus, the PRP has
25 not been finally resolved by the state court.

26 ² Moreover, it does not appear that petitioner will be prejudiced by a dismissal of the instant
action. In particular, the Court notes that the one-year statute of limitations period applicable to §
2254 habeas is tolled by statute while a “properly filed” application for habeas review is pending in
state court. *See* 28 U.S.C. § 2244(d)(2); *see also Nino v. Galaza*, 183 F.3d 1003, 1004 (9th Cir. 1999).

1 recommendation is attached.

2 DATED this 8th day of December, 2008.

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4 JAMES P. DONOHUE
5 United States Magistrate Judge
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